Supreme Court, U.S.
FILED
MAR 27 1997
OFFICE OF THE CLERK

No. 96-1254

In The

Supreme Court of the United States

October Term, 1996

ALEXANDER PAUL and DARLINGTON COUNTY, of whom ALEXANDER PAUL is

Petitioner,

vs.

C.R. CRIBB and VACIE S. CRIBB,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Carolina

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

When no federal question has been presented to a state court during the trial of a case, and an Order is issued based, in part, upon an agreement announced by the participating attorneys in open court in the presence of the parties, and the Order so issued does not address any federal questions and on appeal for the first time a party attempts to raise a state constitutional issue and does not allege that he has previously been prevented by the trial court from raising any issue's, nor alleges that he did not consent to the agreement announced in his presence in open court by his attorney, has a party been denied constitutional due process and should he be allowed to assert at this time in a Petition for Writ of Certiorari that the trial court refused to allow him to speak and that he disagreed with the settlement announced by his attorney?

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Respondents request that the Court deny the Petition for Writ of Certiorari seeking review from the Opinion of the South Carolina Court of Appeals of May 14, 1996, unpublished Opinion Number 96-UP-144. This Order is identified as Appendix C to the Petition.

STATEMENT OF JURISDICTION

It is Respondents' position that jurisdiction would not vest in this case in the Supreme Court by virtue of 28 U.S.C. § 2104. In a case such as this, jurisdiction would be based, if at all, on 28 U.S.C. § 1257(a). However, in this case, the Court cannot properly exercise jurisdiction over the matter as the question of constitutional due process was never presented to the South Carolina Courts. This newly presented argument may not properly be considered at this time.

STATEMENT OF THE CASE

Respondents respectfully oppose the Petition for Writ of Certiorari in this case. For the most part, the Petition assails the trial judge as well as prior counsel. The Petitioner incorrectly and improperly accuses the trial judge of refusing to allow him to speak, and further states that it was obvious that he had disagreed with a settlement that had been announced by his attorney in open court. The statement formed a basis for one portion of the trial court's Order, and the court made findings as to other portions. While the Petitioner did not raise federal constitutional issues in the trial court in South Carolina, it was not as a result of this opportunity being denied by the court in any way, but is simply being asserted as an after-thought by the Petitioner, as he is once again attempting to avoid the Orders of the South Carolina Courts in this matter.

A. Course of Proceedings and Disposition of the Case Below.

The Respondents first filed their case on August 7, 1989. This action basically dealt with two (2) issues. One of these issues related to the claim by the Respondents that the dirt road known as the Round O Church Road, was a County Public Road and should be declared as such to be maintained by the County of Darlington (S.C.) The case was ultimately referred to the Honorable J. Woodrow Lewis as Special Master. Judge Lewis had, at that time, retired as the Chief Justice of the South Carolina Supreme Court, and kindly agreed to serve as Special Master in this case. Judge Lewis issued his Order in this matter on November 12, 1990.

The Order of Judge Lewis, as Special Master, was affirmed by the Honorable Edward B. Cottingham, Judge of the Fourth Judicial Circuit, by Order dated February 25, 1993. The Petitioner appealed from the Order of Judge Cottingham which affirmed in all respects the Order of Judge Lewis. The Appellate Courts affirmed the Order of Judge Cottingham, and by letter dated December 7, 1993, the Supreme Court of South Carolina advised Mr. Paul that his Petition for Rehearing had been denied.

Hearings were held during 1994 before Judge Lockemy with respect to various issues, including whether or not Darlington County should proceed with immediately reopening the Round O Church Road because it had been plowed under by Mr. Paul. As a result of a hearing held on March 30, 1994, Judge Lockemy issued an Order dated April 21, 1994, which provided that Mr. Paul would remove crops growing in the area of the Round O Church Road, as well as an electric fence and that on April 30, 1994, Darlington County would commence with reopening and reworking the Round O Church Road in its entirety. The Order further provided that if Mr. Paul did not comply with this provision of the court Order, that he should immediately be brought back before the court for a Rule to Show Cause hearing.

Difficulties continued after the county performed its survey, as Mr. Paul placed posts immediately adjacent to the area where the road was to be located according to the position of Darlington County. Further, an issue arose as to the proper interpretation of the Order of Judge Lewis as to the width, boundaries and location of the Round O Church Road. A Notice of Hearing as to the issues which would be addressed was served on the Petitioner. However, no responsive pleading was filed by Mr. Paul attempting to raise any additional issues, including whether or not he had been denied any due process rights under the Fifth and Fourteenth Amendments of the United States Constitution. A hearing was held in this matter before Judge Lockemy on September 14, 1994, and it was concluded on September 19, 1994. The issues to be addressed at that hearing were discussed by the court with the attorneys from pages 8 through 19 of that transcript. The court provided the attorneys the opportunity, at that time, to present what the attorneys felt, on behalf of their clients, were the issues to be addressed. Ms. Holloway, as the attorney for the Petitioner, had ample opportunity to raise the issue that if the court concluded that an additional amount of land was needed to handle the dirt being pushed aside by the plowing and scraping activity, that it would constitute an unlawful taking without compensation. At no time was this issue presented by Ms. Holloway. Of course, the court, at that time, was interpreting the language of the Order issued by Judge Lewis, and if the interpretation was that the Order provided for a maintained surface of eighteen (18') feet to twenty-two (22') feet and such additional area as necessary to handle the dirt pushed aside, then there would be no reason to raise such issues, as all the court was doing was restoring the road which had been destroyed by Mr. Paul to its original size, location and width.

Following the conclusion of the testimony in this case on September 19, 1994, the court again addressed the issues which

it had before it to be considered. These issues are found on pages 50 through 55 of the transcript. The court inquired on lines 7 and 8 on page 52 as to whether or not there were any other issues to be considered by the court. While the Respondents' attorney presented another potential issue, Petitioner's attorney, though having the opportunity to try and insert federal constitutional issues even though no testimony had been offered on the same, advised the court on page 55 at line 19 that there were no other issues. Further, the testimony of the Petitioner is found on pages 36 through 49 of the transcript taken on September 19, 1994, and at no point in Mr. Paul's testimony is there any effort by him to raise federal constitutional due process issues. Had the Petitioner attempted to raise these issues, then certainly his testimony would have been included in his Appendix.

Judge Lockemy issued his Order on October 18, 1994, and that Order, as well as the Orders of the appellate court in South Carolina are printed in the Petitioner's Appendix.

B. Correction of Misstatements in the Petition.

Pursuant to United States Supreme Court Rule 15.1, Respondents bring the following misstatement of facts contained in the Petition to the Court's attention.

The Petitioner misrepresents to this Court that the hearing conducted by the lower court on September 14 and 19, 1994, was "... to determine where the road was to be located and whether the county could take an additional six (6') feet in width so as to maintain the road as a 'two (2) plow' road with a three (3') foot shoulder on each side." As is clearly shown in the Notice of the Hearing and the portions of the transcript where the issues to be covered were discussed, the court, at no time, was discussing the taking of an additional six (6') feet in width, but

was discussing what was the proper interpretation of the Order of Judge Lewis and as to whether or not the eighteen (18') feet to twenty-two (22') feet described by Judge Lewis was to include the area where the dirt was pushed up or whether it was to exclude that area. To the extent that the court was making any definitive decision as to an actual width needed to handle the area where the dirt would be pushed, it was only making a determination that if Judge Lewis intended for that area to be in addition to the eighteen (18') feet to twenty-two (22') feet of plowed area, what width was needed to handle the dirt. Such an interpretation of the Order of Judge Lewis would not amount to a taking because Judge Lewis had already ordered that enough area be included in the right-of-way to have a road that would have a traveled surface of eighteen (18') feet to twenty-two (22') feet, plus enough shoulder to handle the dirt from the plowing activity. There is no "taking" involved with the interpretation of the Order of Judge Lewis.

The Petitioner also asserts to this Court that at the time he asked to speak to the court, that it was for the purpose of objecting to the purported agreement which had been announced by his attorney. There is, however, no statement by Mr. Paul in the record to support the contention that he was speaking for the purpose of objecting to the agreement. Had he been intending to do so, one would clearly have expected Mr. Paul to state simply that he objected to the agreement.

The Petitioner also states to this Honorable Court that the trial court refused to allow a party to be heard and, instead, chose to force a case to close through a purported agreement. The Petitioner fails to set out that at the point where the agreement was reached, all testimony had been received and the case had, at that time, been concluded. The Petitioner also fails to point out and address the fact that independent of any agreement announced to it, that the court made its own finding

and conclusion with respect to the interpretation of the Order of Judge Lewis and found that the proper interpretation was that there should be in addition to the scrapped road area which will vary in width between eighteen (18') feet and twenty-two (22') feet, added thereto an additional six (6') feet to handle the dirt pushed up from the process of maintaining the road. While an agreement may have been given to the court, the court was free at that point in time, when it issued its Order, to make its own findings of fact, and it, in fact, did so.

C. Objection to Question.

Pursuant to United States Supreme Court Rule 15.1, Respondents object to the consideration of the question presented in the Petition based on what occurred in the proceedings below.

The Petitioner states that the court refused to allow him to speak. As previously set out in the Misstatement of Facts, such an assertion does not comport with what actually occurred at the hearing. Further, the Respondents object to the assertion by the Petitioner that it was obvious that he had disagreed with the settlement announced by his attorney. Again, a reading of the entire record shows that there is no evidence to that effect, and the Petitioner never said that he objected to the settlement agreement. Further, the Petitioner never filed a Motion for Reconsideration by the trial court based upon an alleged objection to the agreement, nor when the Petitioner appealed the case, did he anywhere state in his brief to the court that he objected to the agreement as announced by his attorney.

REASONS FOR DENYING THE WRIT

I.

THIS COURT HAS NO JURISDICTION TO CONSIDER THE PETITIONER'S ARGUMENT.

This Court wisely refuses to review judgments rendered by the highest court of a state unless a federal question has been both raised and decided in the state court below. *Yee v. City of Escondido,* 503 U.S. 519, 118 L. Ed. 2d 153, 112 S. Ct. 1522 (1992).

As stated in *Yee v. City of Escondido, supra,* "In short, Petitioners did not raise a substantive due process claim in the State Courts, and no State Court has addressed such a claim. In reviewing the judgments of State Courts under the jurisdictional grant of 28 U.S.C. § 1257 [28 U.S.C.S. § 1257], the Court has, with very rare exceptions, refused to consider Petitioners' claims that were not raised nor addressed below."

South Carolina law is consistent with federal law, and arguments not presented to the trial court cannot be presented in the appellate courts. As stated in the case of *McCoy v. McCoy,* 283 S. Ct. 383, 323 S.E. 2d 517 (1984), Constitutional objections cannot be raised for the first time on appeal. Further, a reading of the Petitioner's appellate brief reveals that the Petitioner never attempted to raise any federal constitutional issues. In his appellate brief, for the first time, the Petitioner specifically referred to the South Carolina Constitution, Article I, Section 13, and while such a position was not timely raised by the Petitioner, it did not encompass any assertion that his federal constitutional rights had been violated.

Pursuant to United States Supreme Court Rule 14.1 (g)(i),

the Petitioner, when review of a state court judgment is sought, is to specify at what stage of the proceedings both in the court of first instance and in the appellate court, the federal question sought to be reviewed was raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific references to places in the record where the matter appears so as to show that the federal question was timely and properly raised, and that this Court has jurisdiction to review the judgment on a Writ of Certiorari. The reason Petitioner has not met these requirements of Rule 14.1 of the rules of the Supreme Court is because no federal question was ever presented, and at no place does the Order of the trial court address any federal issue. The Petitioner seeks to skirt this important rule by simply asking the rhetorical question of "How may a party preserve an issue for Appeal when the Court refuses to allow the party to speak, and encourages attorneys to conclude the case within an agreement to which the client refuses to subscribe?" Of course, the record does not even support the contention set forth by the Petitioner in his query. The Petitioner clearly had the opportunity to file appropriate pleadings raising any due process issue under the Fifth and Fourteenth Amendments of the United States Constitution at any point in the original proceeding beginning in 1989, when the Complaint was filed by the Respondents to establish the Round O Church Road as a County Public Road, and further, these issues could have been raised at any point prior to the hearing actually held on September 14 and 19, 1994, when the Order of Judge Lewis was interpreted by Judge Lockemy. The Petitioner was clearly given notice of the issues that the Respondents were going to raise at the hearing and had ample opportunity to present to the court any other issues which he felt were appropriate. Further, prior to taking any testimony, the record clearly shows that Judge Lockemy inquired of the attorneys, in the presence of their clients, as to what issues were being considered, and after all of

the testimony had been received, and before any agreement had been announced, discussed with the attorneys in the presence of their clients the issues which the court was considering and gave the attorneys the opportunity to attempt to raise any additional issues. Further, Rule 59 of the South Carolina Rules of Civil Procedure provides that a party may move for a new trial or may move to alter or amend a judgment. This was an additional opportunity for the Petitioner to assert that he did not agree with the representations announced by his counsel in open court, as well as an opportunity to assert to the court that he did not consent to the agreement announced by his attorney, but that he did not do so because the court had not allowed him to speak. The Petitioner might also have attempted to use Rule 59 as a vehicle for presenting to the court information relating to his constitutional objections, if any he had. The Petitioner clearly did not avail himself of any of these opportunities to present constitutional issues to the court and cannot now be heard to complain that he was cut off by the court when he tried to object. Clearly, if Mr. Paul had intended to object, he would not have said, "This is a case that would make the founding forefathers of this County's bones, dried bones, get up and tremble in their graves." At that point, the Petitioner would have simply said, "I object to what my attorney has just stated to the Court."

The Rule in South Carolina is that a party is bound by his attorney's statements and agreements affecting a pending case. *Arnold v. Yarborough,* 281 S. Ct. 570, 316 S.E. 2d 416 (Ct. App. 1984). In that case, Yarborough had argued to the court that he never gave his attorney the authority to settle the case on the terms reached. That court went on to cite the case of *Ex Parte Jones,* 47 S. Ct. 393, 25 S.E. 285 (1896) wherein it is stated:

> . . . The employment of an attorney in a particular suit implies his client's assent that he may do everything which the Court may

> approve in the progress of the cause. Upon this distinction in large measure rests the certainty, verity, and finality of every judgment of a Court. Litigants must necessarily be bound by the acts of their attorneys in the conduct of a cause in Court, in the absence, of course, of fraud.

Clearly, in this case, there is no accusation that Petitioner's attorney in the trial court behaved in fraudulent manner, nor is there any basis for granting relief to the Petitioner because he now decides he does not like the outcome.

II.

THE SOUTH CAROLINA COURT DID NOT TAKE ANY PROPERTY OF THE PETITIONER.

The Petitioner states that the Order he has challenged relocated the road to a place that it clearly had never been in the past and also widened it. He states that there was no evidence as to how wide the road actually had been in the past, and the county testified that it had actually maintained roads as narrow as ten (10') feet to twelve (12') feet. Accordingly, the Petitioner contends that he should be compensated for the taking of any property which was not included in the original dirt road across his farm.

What the Petitioner fails to recognize in this case is that there has been no taking of property belonging to him. Rather, the Petitioner has, by his efforts, continuously attempted to take property, *i.e.*, the Round O Church Road, which belonged to the public and use it as a part of his fields to be planted for agricultural purposes and from which he would receive economic gain.

In the Order of Judge Lewis, he clearly states that the testimony revealed that the Round O Church Road had been maintained as a two (2) plow road, which resulted in a width of between eighteen (18') feet to twenty-two (22') feet, on which vehicles traveled, plus the area along the shoulders on which the dirt was pushed. It could be argued that Judge Lewis did not define the width adjacent to the eighteen (18') feet to twenty-two (22') feet scraped area on which dirt was to be pushed because he intended that whatever area was needed to handle the dirt was within the public's right of way. The issue only arose because of the desire of the county to know exactly how much area was within its right-of-way, and the conduct by the Petitioner in placing electric fences and posts along the area which was to be reopened as the Round O Church Road. While the county may have some roads which it maintains as narrow as ten (10') feet to twelve (12') feet, Mr. Bobby Richardson, who has been employed with Darlington County from August, 1973, until 1987, as an equipment operator, and since that time as Maintenance Director, testified at the September 19, 1994, hearing on page 8, line 4, through page 9, line 4, that he was familiar with the road in question. He testified that you could not have a two (2) plow road with a spray area adjacent to it in an area between eighteen (18') feet and twenty-two (22') feet if you were going to use the full width of the blade on the machine. He testified that he was familiar with the road in 1987, and that this road, as it existed in 1987, plus the spray area, would not have been able to fit within the eighteen (18') feet to twenty-two (22') feet parameter set out in the prior court Order. Further, when the court was discussing the issues with the attorneys on September 14, 1994, prior to the taking of testimony, the court inquired of Mr. Lucas, the attorney for Darlington County, as to whether or not cars can go both ways on a fifteen (15') foot road. At that time, Mr. Lucas advised the court that it would be very, very difficult. Mr. Lucas further advised the court that it is "pushing it" when a road is eighteen (18') feet wide, however, a

two (2) plow road generally can accommodate two (2) cars. This testimony is on page 18, lines 21-25 and page 19, lines 1-5 of the September 14, 1994, transcript.

At this point, Judge Lockemy was considering an appropriate interpretation of the Order of Judge Lewis. Judge Lewis had already made a finding that there was a County Public Road going through the Petitioner's land, which was a two (2) plow road, meaning that it would be eighteen (18') feet to twenty-two (22') feet, on which vehicles traveled, and in addition, there would be enough area along the shoulders along which dirt would be pushed. In interpreting the Order of Judge Lewis, any finding based upon appropriate principles of law would not constitute a taking, but would simply put back into the public domain property which the Petitioner was trying to confiscate.

On Appeal from the Order of Judge Lockemy, the court applied the appropriate standard of review and stated that in a case tried without a jury, Appellate review is limited to correction of errors of law and determinations as to whether there is any evidence to support the trial court's factual findings. *Townes Assocs. v. City of Greenville,* 266 S. Ct. 81, 221 S.E. 2d 773, (1976). The appellate court clearly found that there was sufficient evidence to support the finding reached by the trial court, independent of any agreement, that the proper interpretation of the Order of Judge Lewis should be that in addition to the scraped road area, which will vary in width between eighteen (18') feet to twenty-two (22') feet, there should be added thereto an additional six (6') feet to handle the dirt pushed up from the process of maintaining the road. Such an interpretation by the trial court does not result in a taking of the Petitioner's property.

III.

THERE ARE NO UNITED STATES SUPREME COURT RULE 10 CONSIDERATIONS PRESENT IN THIS CASE.

Rule 10 of the United States Supreme Court Rules provides that a Petition for a Writ of Certiorari will be granted only for compelling reasons. Rule 10(b) indicates that the Court will consider granting certiorari where a state court of last resort has decided an important federal question in a way that conflicts with the decisions of another state court of last resort or of a United States Court of Appeals. As previously pointed out, there has been no federal question decided at any point by a South Carolina Court. This case involved the interpretation of a prior Order issued by Judge Lewis. When Judge Lockemy, by his Order of October 18, 1994, interpreted the earlier Order of Judge Lewis dated November 12, 1990, he was resolving an issue of state law and applied state law in reaching his conclusion. No federal question whatsoever is addressed by the trial court, nor has a federal issue ever been addressed or presented to the trial courts throughout the entire history of this case.

CONCLUSION

The question presented by the Petitioner was not preserved and has no basis in fact and does not warrant this Court's attention. It is respectfully submitted that the Petition should be denied.

Respectfully submitted,

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